SUPREME COURT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 494

BROTHERHOOD OF RAILROAD TRAINMEN AND
A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. .....

BROTHERHOOD OF RAILROAD TRAINMEN AND A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the adverse judgment entered by the United States Court of Appeals for the Fifth Circuit, whereby it affirmed the final judgment of the United States District Court for the Northern District of Alabama.

A.

OPINIONS OF COURTS BELOW AND OPINION OF ADMINISTRATIVE AGENCY.

The opinion of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed has not been reported at the time of the printing of this petition. Copies of the following are appended hereto, pages A1 through A22, pursuant to Rule 23 (1)(i): the opinion of the United States Court of Appeals for the Fifth Circuit, the judgment, the opinion of the United States District Court for the Northern District of Alabama and the opinion of the First Division of the National Railroad Adjustment Board ordering the reinstatement of Petitioner A. W. Davis.

B.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is invoked on the following basis:

1. The judgment entry of the United States Court of Appeals for the Fifth Circuit adverse to Petitioners was made on July 9, 1964.

2. Jurisdiction to review the judgment or decree in question by Writ of Certiorari is conferred on this Court by virtue of Title 28, U.S.C.A., §1254 (1):

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C.

QUESTION PRESENTED FOR REVIEW.

The question presented for review by this petition may be stated as follows:

1. Under Section 3 First (m) of the Railway Labor Act, awards of the National Railroad Adjustment Board are final and binding on both parties to the dispute except insofar as they contain a money award. In view of this provision, is an award of the Adjustment Board requiring a railroad to reinstate a discharged employee enforceable in the United States District Court without review on the merits by trial *de novo*.

D.

THE FEDERAL STATUTES INVOLVED.

Several statutes are involved and, because of their length, only the citations are included here with the texts of the same being set forth in the appendix:

28 U.S.C.A., §1337.
45 U.S.C.A., §151(a).
45 U.S.C.A., §153(i) through (p).

Because the interpretation of Section 3, First (m) of the Railway Labor Act [45 U.S.C.A., §153(m)] is particularly involved, it is set out both at this point and in the appendix:

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and *the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.*

In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute." [Emphasis added].

E.

STATEMENT OF THE CASE.

Petitioner A. W. Davis, a member of the Petitioner Brotherhood of Railroad Trainmen, was discharged from the service of the Respondent, Louisville and Nashville Railroad Company, on January 9, 1959, because of his alleged violations of certain operating rules of the Respondent which violations, Respondent contended, contributed to cause a collision between two freight trains at Peterman, Alabama, on December 11, 1958 (R. 30, 73, 95). The engineer operating the train which collided with the rear of that train on which Petitioner Davis was conductor was given only a 60 day record suspension for his part in the collision (R. 30). Petitioner Davis processed a grievance through the proper personnel of the Respondent alleging that he was discharged without just cause and therefore in violation of Article 31, Collective Bargaining Agreement (R. 30, 81, 100, 667). The matter was submitted to the National Railroad Adjustment Board on the transcript of testimony given at the investigation of the collision conducted by Respondent and certain photographs of the collision (R. 571 through 666). On February 17, 1961, the First Division of the National Railroad Adjustment Board, finding that the discharge of Petitioner Davis was discriminatory and arbitrary and, therefore, violative of the Collective Bargaining Agreement, sustained the claim of Petitioner Davis and ordered that he be reinstated to the service of the Respondent with seniority unimpaired and with a record suspension of 60 days and ordered that he be paid for all time lost (R. 30, 70).

The Respondent refused to comply with any portion of the aforesaid award and order and this action was instituted by the filing of a petition in the United States District Court for the Northern District of Alabama seeking to compel compliance therewith (R. 19).

Jurisdiction is conferred on the United States District Court by the Railway Labor Act, 45 U.S.C.A., §153, and by Title 28, §1337, of the United States Code, giving district courts jurisdiction of any civil action or proceeding arising under Acts of Congress regulating commerce. 28 U.S.C.A., §1337.

On proof of the contents and entry of the aforesaid award and order, Petitioners filed a motion for partial summary judgment seeking enforcement, without review on the merits, of that portion of the award ordering the reinstatement of Petitioner Davis (R. 83, 84, 101, 108). As a ground for said motion, Petitioners relied on Section 3, First (m) [45 U.S.C.A., §153(m)] of the Railway Labor Act which provides, in part, that awards of the National Railroad Adjustment Board "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award" (R. 108). Petitioner's motion was denied by the Trial Judge who ordered a trial *de novo* before a jury on the merits of the award (R. 111, 116). The sole question tried and submitted to the jury on the trial *de novo* was the correctness of the award of reinstatement which, of course, depended on whether or not the discipline imposed by Respondent was justified in view of Article 31 of the Collective Bargaining Agreement prohibiting the discharge of employees without just cause (R. 559 through 570, 667).[1] The jury returned a

1. After the Trial Judge had ruled that the entire award, both as to reinstatement and back pay, was reviewable *de novo*

verdict for the Respondent and judgment was entered thereon (R. 124, 125, 126). Petitioners filed a motion for new trial or in the alternative for a judgment notwithstanding the verdict alleging as error the review by trial *de novo* of the merits of the award of reinstatement, which motion was overruled (R. 126, 130). Petitioners then perfected an appeal to the United States Court of Appeals for the Fifth Circuit which affirmed the judgment in the District Court holding that the merits of a non-money award of the National Railroad Adjustment Board were reviewable by trial *de novo* in a suit for enforcement under the Railway Labor Act (R. 131, 672, 682).

F.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A Writ of Certiorari should be allowed in this case for the reasons that (1) the decision of the Court of Appeals conflicts with the principles of applicable decisions of this Court, and (2) the Court of Appeals has decided an important question under the Railway Labor Act which has not but should be settled by this Court.

The decision of the Court of Appeals that non-money awards of the National Railroad Adjustment Board are reviewable on the merits by trial *de novo* is contrary to the principles of applicable decisions of this Court. In *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), this Court held that a union could

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on the merits, the parties agreed to submit to the jury only the question of reinstatement reserving to the Court to later decide, without intervention of a jury, the issue of a monetary award if any were due (R. 120, 123)

not strike to enforce a money award of the Adjustment Board because the grievance process prescribed by the Railway Labor Act was not regarded as complete until enforcement of this type award was sought in the Court under Section 3, First (p), 45 U.S.C.A., §153 (p). In reaching this decision, it was recognized by the majority that a distinction existed between money and non-money awards of the Board insofar as their finality was concerned. At page 40 this Court said:

> "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, an issue wholly separable from the merits of the wrongful discharge issue. This, then, is clearly a controversy concerning a 'money award' as to which decisions of the Adjustment Board are not final and binding."

Mr. Justice Goldberg, with whom Mr. Justice Douglas joined, dissented from the opinion of the majority expressing the view that denial of the right to strike in the situation presented foreclosed the use of a traditional weapon available to the employee, and thus, resulted in an "unevenhanded" application of the statute. He argued that had the employee lost before the Board, its action would have precluded further review of the matter, while the carrier by mere inaction could compel a complete retrial of the issues involved in the money award. In expressing this view, Justice Goldberg also discussed the distinction between money and non-money awards and the type of judicial review to be afforded each under the Act:

> "[W]e are dealing not with a non-money award which is made specifically 'final and binding' by the statute, but with a money award which, as the majority recog-

> nizes, is governed by different considerations and is treated differently in the statute itself. A money award by the Board is expressly declared by the Act *not* to be 'final and binding'. The enforcement machinery contained in subsection (p) of the Act—which the Court's opinion inferentially suggests is confined to money awards, and which I would expressly declare to be so limited—contemplates for such awards not that limited type of review applicable to 'final and binding' non-money awards, but a de novo trial before the court, subject only to the limitation, as the statute requires, that the findings of fact of the Board shall constitute 'prima facie' evidence." (p. 43).

In a footnote to his opinion Mr. Justice Goldberg discussed the inapplicability of the *prima facie* evidence rule in paragraph (p) to non-money awards made final and binding by paragraph (m) where he said:

> "A common sense and practical reading of the statutory provisions seems to me to compel the conclusion that subsection (p) is confined in its application to money claims. Subsection (m) makes all non-money awards 'final and binding' and any reading of subsection (p) which allows de novo review of the merits of such awards would be directly contradictory of the effect expressly accorded to them." (p. 43).

Thus, although the majority and dissenting opinions disagreed on the question of whether or not the right to strike was available as a means of enforcing a money award, they did apparently agree that money and non-money awards were treated entirely different under the statute insofar as their finality is concerned. In the earlier decision of *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), Justice Black, delivering the opinion of the Court, noted the distinction between a reinstatement order and a money

award and the judicial review applicable to each when he stated:

> "The board cannot only order reinstatement of the employees, should they be actually discharged, but it can also under §3, First (o) and (p) grant a money award subject to judicial review. . . ." (p. 566).

This Court has expressed the utmost confidence in the ability of the National Railroad Adjustment Board to finally determine grievances of the type here involved as well as other disputes within the railroad industry. The Board has been characterized as "peculiarly competent" and "well equipped to exercise its Congressionally imposed function", because its members understand railroad problems and speak the railroad jargon. *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950). This confidence has been demonstrated in several decisions which have had the effect of increasing the authority of the Board while restricting that of the Court. In *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 66 S. Ct. 322, 90 L. Ed. 318 (1946), *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950), and *Order of Railway Conductors* v. *Southern Railway Company*, 339 U.S. 255, 70 S. Ct. 585, 94 L. Ed. 811 (1950), this Court held that state or federal courts have no power to adjudicate disputes involving the interpretation of collective bargaining agreements when the National Railroad Adjustment Board has not acted. In the limited instance where the Court is allowed to act when the Board has not, the Court's interpretation of the bargaining agreement is not binding on the Board. Under the case of *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941), a discharged employee may accept the Railroad's action in terminating his em-

ployment as final and sue for damages in the courts as opposed to seeking reinstatement and back pay before the Board, assuming state law does not require him to exhaust his administrative remedies. *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953). However, if the Court in handling such a case must consider some provision of the collective bargaining agreement, its interpretation has no binding effect on future interpretations of the same or similar agreements by the Board. *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953); *Slocum* v. *Delaware, L. & W. Railroad Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950).

In *Pennsylvania Railroad Company* v. *Day*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. Ed. 2d 1422 (1959), this Court held that the Adjustment Board had exclusive primary jurisdiction over disputes between railroads and active or retired employees and ordered a suit filed by a retired employee who had not processed his claim through the Board dismissed for lack of jurisdiction.

In *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959), it was held that a discharged employee who received an adverse determination of his claim for reinstatement and back pay before the Board was precluded from later pursuing his common law remedy for damages. This Court held that the denial of a money claim was not a money award reviewable under the provisions of subsection (p) and, therefore, under subsection (m) the decision of the Board was final and binding on the employee.[2] The rea-

2. In response to the contention of the dissenting Justices that the denial of a money claim is a money award reviewable under subsection (p), the majority recognized the disparity in

soning of the majority was that failure to give the intended effect to the final and binding provisions of subsection (m) would be to say that the function of the Board was only to render advisory opinions, a contention wholly inconsistent with the Act's terms, purposes, and legislative history.

The result is that an active or retired employee or a discharged employee residing in a state which requires the exhaustion of administrative remedies has no choice of forum in which to settle his grievances but must submit them to the Adjustment Board. If the determination by the Board is adverse, under the *Price* case, *supra*, the employee cannot obtain judicial review of his claim because non-money awards are made final and binding by subsection (m). 45 U.S.C.A., §153 (m). Are non-money awards any less final or any less binding when the employee is successful before the Board? The Act states that such awards are final and binding on "both" parties to the dispute. 45 U.S.C.A., §153 (m).

The restriction enunciated in the above cases against judicial review of grievances and disputes within the jurisdiction of the Adjustment Board is in accord with the strong federal policy of final settlement of labor disputes by arbitration set out in the so-called Steelworker's Trilogy. *United Steelworkers of America* v. *American Manufacturing Company*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America*

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judicial review which Congress had created in the case of a money award, but did not indicate, as some contend, that Congress intended that non-money awards receive the same treatment.

v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960). In the *Enterprise Wheel and Car* case, *supra*, where the arbitrator ordered reinstatement with back pay for certain discharged employees under a collective bargaining agreement providing that awards of the arbitrator will be final and binding on the parties, the Court of Appeals differed with the arbitrator's construction of the collective bargaining agreement and refused to enforce the award. This Court reversed stating:

> "The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. (p. 596).
>
> * * *
>
> "This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." (p. 599).

In *United Steelworkers* v. *American Manufacturing Company, supra*, Mr. Justice Douglas speaking for the majority enunciated this view in even stronger terms when he said:

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." (p. 568).

In the *Warrior and Gulf Navigation Company* case, *supra*, the Court made clear the reason for this Federal policy by referring to what it termed "the common law of the shop". The Court said that the arbitrator's source of law was not confined to the express provisions of the collective bargaining agreement but was tempered by his knowledge of the practices of the industry. Justice Douglas writing for the majority said at page 582:

"The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

The contractual provision concerning the finality of the arbitration awards in the Steelworker's Triology is found in almost identical form in Section 3 First (m) of the Railway Labor Act with the exception that subsection (m) excludes money awards. 45 U.S.C.A., §153 (m). Since the submission of disputes to the Adjustment Board is not by agreement, the purpose in excluding money awards from the final and binding provisions of subsection (m) undoubtedly was to avoid the denial of the right to trial by jury in suits claiming money damages. In the case of non-money awards, however, the scope of judicial review should be no greater than that permitted in the above discussed cases. This is the view adopted by Mr. Justice Goldberg in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), where he states as a part of the opinion previously discussed:

"The logic of Chicago River is that 'final and binding' awards of the Adjustment Board are enforceable in favor of, or against, either the employer railroad, the union, or the grievant employee in the federal courts. Given the premises of Chicago River, it must follow that such enforcement proceedings are governed by federal law as declared by this court in cases such as . . . [The Steelworker's Triology.] . . . and, of course, that the merits of such awards are not subject to de novo consideration upon a petition for judicial enforcement."

The precise question of whether a non-money award of the Adjustment Board *favorable* to an employee is reviewable on its merits by trial *de novo* in a suit for enforcement has never been decided by this court. The determination of this important question is vital to the effectiveness of the Board in the disposition of grievances within the industry. If the decision of the Court below is allowed to stand then the final and binding provision of Section 3, First (m) is rendered meaningless to the employee who is successful before the Board but remains a bar to the employee whose claim is denied by the Board. Such a disparity of judicial review is conceded to exist in the case of a money award, but there is no statutory requirement that it be extended to a non-money award. The failure of the Courts below to give any effect to the final and binding provision of Section 3, First (m) relegates the Award of the Board to an advisory opinion, a result wholly inconsistent with the terms, purposes and legislative history of the Railway Labor Act. *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959); 45 U.S.C.A., §§151a, 153 (m).

CONCLUSION.

One of the principal purposes of Congress in creating the National Railroad Adjustment Board was to prevent the disruption of commerce by providing for the prompt and orderly settlement of disputes growing out of grievances. 45 U.S.C.A., §151a. If non-money awards are subject to a complete retrial on their merits in the District Courts then the settlement of grievances is far from prompt and the final and binding provisions of paragraph (m) are rendered meaningless insofar as any benefit to the employee in the adjustment of his grievance. Aside from

the temporary procedural advantage which he obtains under the *prima facie* evidence rule of paragraph (p), the discharged employee's prospect of eventual success in such a *de novo* "enforcement" proceeding is no better than it would have been had the dispute not gone to the Adjustment Board and had he filed suit in the District Court in the first instance. 45 U.S.C.A., §153 (p). Certainly, he could obtain a more prompt disposition of the matter and, if the statute is powerless to provide no more than what is probably only an "imagined" advantage under Section 3, First (p) then the logical forum is the Court, as opposed to the Board. 45 U.S.C.A., §153 (p).

Such was not the intent of the Congress, however, when it enacted the Railway Labor Act. The plain language of paragraph (m) and the decisions of this Court on the question are properly construed as preventing *de novo* review of the merits of non-money awards. We do not here contend that non-money awards are not reviewable in any degree. If it be established, for example, that the award of the Board was arbitrary or that one of the parties was not given notice or an opportunity to be heard, then we believe that such an award could be properly set aside by the Court. *Ellerd* v. *Southern Pacific Railroad Co.*, 241 F.2d 541 (C.A. 7th 1957). But to hold, as did the Court below, that the merits of a non-money award of the Adjustment Board, specifically made final and binding by paragraph (m) of the Act, are subject to *de novo* review on the merits by Court or jury runs contrary to the decisions of this Court, the purpose and language of

the Railway Labor Act, and a common sense handling of disputes within the Railroad industry.

Respectfully submitted,

.....,

AL G. RIVES,
Attorney for Petitioners.

CLARENCE M. SMALL, JR., and
RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel for Petitioners.

CERTIFICATE AS TO SERVICE.

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari properly addressed, to each of the following: Honorable James A. Simpson and Honorable Henry E. Simpson, Exchange Security Building, Birmingham, Alabama; and Honorable H. G. Breetz and Honorable M. D. Jones, L & N Office Building, 908 West Broadway, Louisville 1, Kentucky, all counsel of record for the respondent in the court below, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the ... day of September, 1964.

.....,

AL G. RIVES,
Attorney for Petitioners.

APPENDIX

APPENDIX A

Opinion of United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20715

BROTHERHOOD OF RAILROAD TRAINMEN and A. W. DAVIS,
Appellants,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

(July 9, 1964.)

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and McRAE, District Judge.

TUTTLE, Chief Judge: This case arises from a petition to enforce an award of the National Railroad Adjustment Board requiring the Louisville and Nashville Railroad to reinstate and pay back pay to petitioner-appel-

lant A. W. Davis, a member of the Brotherhood of Railroad Trainmen. The Railroad discharged Davis for his part in a rear-end collision of two L & N freight trains within the yard limits of Peterman, Alabama, on December 11, 1958. Davis was the conductor stationed in the caboose of a half-mile long, southbound freight train. The Railroad charged that he failed to keep a proper watch and to place a flagman as required on the rear of the train during a back-up operation; the back-up ended when his train collided with another southbound freight. The engineer of the other freight was given a 60-day record suspension for his part in the collision.

Davis processed a grievance of his discharge through appropriate steps and the matter was submitted to the Board for its decision. The referee found that Davis was to some degree at fault but decided that his neglect was akin to that of the engineer on the other train and hence that the harsher discipline of Davis was discriminatory. Davis was ordered reinstated with pay for lost time and with all rights unimpaired but with a record suspension of sixty days. The Railroad refused to comply and enforcement was sought under 45 U.S.C.A., §153(p). The Brotherhood filed a motion for summary judgment in part seeking immediate enforcement of that portion of the award ordering Davis' reinstatement, but this was denied. The district court ordered a trial *de novo*, in which Davis' service record was admitted, on the merits of the award and a jury found for the Railroad on the issue whether Davis had been discharged for cause.

Appellants first specify as error the trial court's refusal to grant partial summary judgment enforcing reinstatement without review on the merits by trial *de novo*. They contend that such a review of non-money awards is barred

by 45 U.S.C.A., §153(m):—"[T]he awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." A similar contention has recently been rejected by this Court in *Jones* v. *Central of Ga. Ry.*, No. 20948, 5th Cir., May 6, 1964, where a summary judgment denying a petition to enforce an NRAB award of reinstatement and back pay was affirmed. The Court there noted the long line of cases which have consistently held that 45 U.S.C.A., §153(p),[1] conferring jurisdiction on the courts to enforce NRAB awards, gives the district court the power to conduct a *de novo* review of non-money awards of the NRAB. We shall therefore only set out the reasoning used to arrive at this result rather than attempting to examine all of the cases in the field.

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1. "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

In addition to the advantages of being able to select the venue for the suit and of having the weight of prima facie evidence given the Board's award, the petitioner is allowed by the section a reasonable attorney's fee if he prevails and access to the courts without liability for any court costs unless they accrue upon his appeal.

The enforcement provision, subsection (p), makes no distinction between money awards and non-money awards. It refers generally to "an order" of the Board with which the carrier refuses to comply. If any order of the Board is to be enforced in a district court, the procedure set forth in subsection (p) must be followed. The petition must set forth the causes for which relief is claimed as well as the order of the Board; the suit "shall proceed in all respects as other civil suits;" the Board's order is only to be "prima facie evidence of the facts therein stated;" and, finally, the court may make the appropriate order to enforce or set aside the order. From these it is apparent that a trial *de novo* on the merits is contemplated. See *Thomas* v. *New York, C. & St. L. Ry.*, 185 F.2d 614, 616 (6th Cir. 1950); *Dahlberg* v. *Pittsburgh & L.E. R.R.*, 138 F.2d 121, 122 (3rd Cir. 1943). Although the award of the NRAB is to have some probative weight it is not to be legally conclusive even though it is a non-money award. See *Washington Terminal Co.* v. *Boswell*, 124 F.2d 235, 243 (D.C. Cir. 1941), *aff'd by an equally divided court*, 319 U.S. 732 (1943). The provision in section 153(m) that a non-money award is to be "final and binding" obviously has some limits—an award beyond the statutory authority of the Board would not be binding and no award can be enforced without the aid of the courts—see *Dahlberg* v. *Pittsburg & L.E. R.R.*, *supra* at 122; and construing subsection (m) in the context of the entire provision, including subsection (p), "final and binding" may be taken to mean that it is final so long as there is no effort to enforce the award under subsection (p), see *Cook* v. *Des Moines Union Ry.*, 16 F. Supp. 810, 813 (S.D. Iowa 1936).

> "The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes.

> Under both the Act of May 20, 1956, 45 U.S.C.A., §151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the boards had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful and it is plain that the words in question adopted by the framers of the Act of 1934 make the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable judicial decisions."

Dahlberg v. *Pittsburgh & L.E. R.R., supra* at 123, *quoted with approval in Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, 253 F.2d 753, 757 (4th Cir. 1958).

Appellants nevertheless argue that this widely approved construction is incorrect in light of certain language in *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U.S. 33 (1963). The Supreme Court there held that where a carrier reinstated an employee in accord with an NRAB award but insisted, in complying with the back pay order, upon deducting amounts the employee earned from other employers, the union could be enjoined from striking to enforce its interpretation of the Board's award. In the course of the opinion the Court said:

> "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, an issue wholly separable from the merits of the wrongful discharge issue.

> This, then, is clearly a controversy concerning a 'money award,' as to which decisions of the Adjustment Board are not final and binding. * * *
>
> "* * * Congress has, in effect, decreed a two-step grievance procedure for money awards, with the first step, the Adjustment Board order and findings, serving as the foundation for the second. Money awards against carriers cannot be made final by any other means."

We would hesitate to overrule such a well-established precedent on the basis of dictum concerning an issue with which the Court expressly stated it did not deal; it certainly is not a clear mandate for a change. Moreover, we cannot agree that the language used compels the conclusion, as appellants contend, that the Supreme Court intends that a non-money award should be enforced without *de novo* review on the merits. The language in the above quoted passage merely paraphrases the statute; the Court reiterates that awards are final and binding except insofar as they contain a money award, as section 153(m) provides. The Court then refers to section 153(p) to find the mechanism for making a money award final. The fact that non-money awards are made final by a Board order whereas money awards are not, has not been questioned; this, however, does not touch upon the procedure for enforcement of the awards which the Court of Appeals authorities uniformly recognize must be a trial *de novo* on the merits for both types of awards. That the Supreme Court in the *Brotherhood of Locomotive Engineers* case did not intend to overturn these settled precedents may at least be inferred from the Court's two citations, 373 U.S. at 39, 41, with apparent approval of *Washington Terminal Co.* v. *Boswell, supra,* which is the landmark case for *de novo* review. See *Jones* v. *Central of Ga. Ry., supra.* We

recognize, of course, that two dissenting Justices drew the opposing inference from the Court's opinion. See 373 U.S. at 43 (Goldberg, J., dissenting).

To appellants' further argument that *de novo* review of non-money awards thwarts the policy of according finality to settlement by arbitration of labor disputes as expressed in the Steelworkers Trilogy, see, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), we state as did the Fourth Circuit in *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic Coast Line R.R.*, *supra*, at 757-58:

> "If it had been intended * * * that the orders of the Board rendered pursuant to 45 U.S.C.A., §153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A., §§158 and 159 which relate to arbitration under 45 U.S.C.A., §157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

Appellants also specify as error the admission of Davis' service record in evidence before the jury. It is their position that the service record was not used in the Railroad's investigation and hence its admission at the trial was in violation of the collective bargaining agreement.[2] They urge that this record, which showed Davis

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2. "Article 31. Investigations and Discipline.

"1. Conductors will not be demerited, disciplined or discharged without just cause. When such action shall become necessary, the accused shall be * * * given an investigation by the proper officer of the Railroad, at which time all evi-

had been given a total of 195 days of record suspensions for twelve infractions over an eighteen-year period, prejudiced Davis in the eyes of the jury by showing he had been disciplined in the past.

At the outset we are puzzled by appellants' objection to the admission of the service record since attorney for appellants, before the hearing in the court below, moved for production of the service records of Davis and the engineer of the other train, swearing that they were pertinent to the issues in the case. Additionally, the pre-trial order states that all parties agreed that the issue to be decided was whether there was just cause for discharging Davis on the basis of the relative degree of fault of Davis and the engineer "as well as the previous record of each of them."

In addition to the apparent inconsistency of the positions of appellant, we find no error in the admission of Davis' service record. The issue to be decided was whether the discipline imposed was warranted, and certainly Davis' service record is evidence on the validity of his discipline. But appellants say it should be barred simply because of an alleged failure to comply with the procedure outlined for the Railroad's investigation. Yet as we pointed out above, section 153(p) provides for a trial *de novo* "in all respects as other civil suits," except for the special weight accorded the Board's order, and a trial *de novo* contemplates a trial of the entire controversy, including the introduction of evidence not limited to that brought in at the previous hearing. See, *e.g.*, *Spano* v. *Western Fruit Growers, Inc.*, 83 F.2d 150, 152 (10th Cir. 1936). Thus *Callan*

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dence in the case will be submitted. A proper record in the case will be kept, authenticated by both parties, and made the basis for any discipline that may be administered, or an appeal to a higher officer."

v. *Great Northern Ry.*, 299 F.2d 908, 913 and n.5 (9th Cir. 1961), approved a jury instruction stating that both sides have the right to introduce all available evidence on the correctness of an award. Moreover, *Butler* v. *Thompson*, 192 F.2d 831, 833 (8th Cir. 1951), made it clear that procedures set up in a collective bargaining contract for investigations and hearings before company officials do not apply when the statutory machinery for review before the NRAB is invoked. In the case at bar we find no essential unfairness in the admission of Davis' service record; the parties certainly must have known of it beforehand and the award of the Board, since it was based on the disparity of treatment of Davis and the engineer, highlighted the need to compare their respective service records. The contention that admission of the service record was error is without merit.

The judgment is AFFIRMED.

APPENDIX B

Judgment

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20715

D. C. Docket No. 10073 Civil

BROTHERHOOD OF RAILROAD TRAINMEN
and A. W. DAVIS,

Appellants,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and McRAE, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Brotherhood of Railroad Trainmen and A. W. Davis, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Issued as mandate:

July 9, 1964

APPENDIX C

Opinion of the United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and A. W. DAVIS, Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation, Respondent.

Civil Action No. 10073

Invoking the jurisdiction of this court under the provisions of 45 U.S.C.A., §153 First (p), petitioners pray for the enforcement of Award 19,862, Docket 36,935 of the National Railroad Adjustment Board, First Division, entered February 17, 1961, by an appropriate judgment against respondent.

Motions for a summary judgment were filed in behalf both of petitioners and respondent. Each of such

motions was taken under submission and the court has had the benefit of oral arguments and briefs of counsel. For reasons hereinafter to be stated each is due to be denied.

On December 11, 1958, petitioner, A. W. Davis, was employed by respondent as Conductor on its Local Freight Train Number 55 while W. B. Merritt was the Engineer operating respondent's Local Freight Train number 53. On that date the two trains were involved in a serious and costly collision near Peterman, Alabama.

Respondent discharged Davis and disciplined Merritt only to the extent of a sixty-day record suspension. After reviewing the facts, the Board found Merritt's responsibility for the collision to have been akin to that of Davis. It concluded that the disparity between the disciplinary actions taken resulted in impermissible discrimination and that Davis' discharge was therefore arbitary. Davis' service record, disclosing previous disciplinary actions, was in evidence; Merritt's was not. The Board ordered Davis' reinstatement, with pay for all time lost and with all rights unimpaired, but with a record suspension of sixty days as of January 9, 1959.

The collective bargaining agreement then in force between the petitioning union and respondent provided, *inter alia*:

> "Conductors will not be demerited, disciplined, or discharged without just cause. . . ."

It is almost axiomatic that there is never just cause for the infliction of truly discriminatory punishment and the quoted provision of the contract would seem clearly to preclude it. *Cf. Textile Workers Union of America* v. *American Thread Co.*, 291 F.2d 894 (4th Cir. 1961). The

Board has consistently thus construed similar provisions in other railroad-union agreements. (See, *e.g.*, Awards No. 6785, 16930, 15315, 1140, 18037, 16576, 17398, 19901, 18114, and 9378.) While the Board's interpretations of such agreements are not binding upon the courts they are entitled to more than usual respect. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239, 243 (1950); *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 556-57 (1959).

The burden of respondent's argument in support of its motion, conceding the validity of the foregoing proposition, is that there was an utter absence of evidence before the Board to support a conclusion of discrimination in the administration of discipline as between Davis and Merritt. Of course management has a right to take into account previous misconduct in determining appropriate disciplinary action the service record of Davis received in evidence disclosed twelve infractions of varying degrees of severity. Merritt's record was not before the Board and respondent's argument runs that the Board was bound to assume, as it did in its Award No. 5397 (Jan. 13, 1941), that such record was good.

Since respondent, by giving Merritt a sixty-day record suspension, recognized that he was not free from fault in the collision, it is difficult to understand why it did not offer his previous record to justify its disparate treatment of Davis. There is respectable authority declaring that under these circumstances it was under a duty to present such evidence. Disciplinary Hearings Under the Railway Labor Act: A Survey of Adjustment Board Awards, Vol. 46, *Minnesota Law Review*, No. 2, pp. 290, 307, 320-22 (December, 1961).

Be that as it may, since the trial in this court on the issues tendered by the petition and answer is *de novo*, the

court is of the firm opinion that the evidence offered in support of the respective motions for summary judgments shrieks of genuine issues of material facts to be resolved. Whether Davis was discharged without just cause would seem to be depend upon whether he was discriminated against after considering all of the evidence relevant to the degree of fault on the part of both Davis and Merritt as well as the previous record of each of them.

There remains the question, raised by the court at oral argument, as to the availability of a trial by jury, demanded by petitioners. The court is of the opinion that respondent's oral motion to strike such demand is due to be denied.

It seems clear that the Congress, in enacting a statute creating a right unknown to the common law, may provide a remedy by trial to the court without the intervention of a jury. The Seventh Amendment would have no application. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). While some of the reasoning by analogy in that opinion, which led Professor Moore to apply its principles to a suit to enforce an award of reinstatement and back wages under the Railway Labor Act (5 Moore, Federal Practice, Par. 38, 37 [3], at 301-02) may have been eroded by statements in *Dairy Queen* v. *Wood*, 369 U.S. 469, 30 LW 4300 (1962), further pursuit of that intriguing probability would be at best an academic exercise.

Here the right involved was created not by statute but by contract. *Thomas* v. *New York, Chicago & St. Louis R. Co.*, 185 F.2d 614 (C.A. 6, 1950). The Act fashions a remedy for its enforcement. The problem is to determine whether the Congress intended to preclude a jury trial. *Chappell & Co.* v. *Palermo Cafe, Inc.*, 146 F. Supp.

867, 868 (D. Mass. 1956). If it did not, no Seventh Amendment question is reached.

In *Meeker & Co.* v. *Lehigh R.R.*, 236 U.S. 412, 430 (1915), the Supreme Court assumed, if it did not explicitly hold, that in a suit brought under 49 U.S.C.A. 16, par. (2) to enforce a reparation award of the Interstate Commerce Commission a jury trial is demandable as of right. The provisions of 45 U.S.C.A. 153 First (p), enacted in 1926, are, for all practical purposes, identical. The conclusion to be drawn from such comparison is almost self expressive. See also: *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548 (dissenting opinion) [1959].

This is the 6th day of December, 1962.

(Signed) SEYBOURN H. LYNNE,
JUDGE.

APPENDIX D

Opinion of the First Division of the National Railroad Adjustment Board

Award 19862
Docket 36935

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

39 South LaSalle Street, Chicago 3, Illinois
with Referee Carroll R. Daugherty

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN
LOUISVILLE AND NASHVILLE RAILROAD
COMPANY

STATEMENT OF CLAIM: Claim of Conductor-Trainman A. W. Davis, Pensacola Sub-Division, for rein-

statement as conductor-trainman with seniority unimpaired and for pay for all time lost from the Carrier's service account dismissed without just cause, January 9, 1959."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

On December 17, 1958, carrier charged the crews of second class freight trains Nos. 53 and 55 with responsibility for a collision that occurred at Peterman, Alabama, on December 11, 1958. An investigation was held on this charge on December 20, 1958. On January 9, 1959, claimant Davis, the conductor on train No. 55, who had "engineered" a back-up movement of his train just before the collision, was dismissed from carrier's service; and Merritt, the engineer of train No. 53, which had been in forward movement before the collision, was given a record suspension of sixty days.

Carrier contends that claimant was mainly responsible for the accident because he was not alert and he failed to pull the emergency brake in his caboose before jumping to safety. Thus, says carrier, claimant disobeyed the following operating rules of carrier: General Notice; Rule B, first sentence; Rule 93, second paragraph, first sentence; Rule 103; Rule 108; and Rule 846.

As in all discipline cases, the Division's task here is to study the record of the investigation to discover whether substantial evidence therein supports carrier's disciplinary decision. If such evidence is judged lacking,

then carrier's decision may properly be held to have been arbitrary, capricious, or discriminatory.

In the instant case this task is made unusually difficult because of the numerous contradictions and conflicts in the testimony presented at the hearing and because of the omission of definite information on certain important points.

As to claimant's activities in the caboose of No. 55 during the backup movement before the collision, the only direct witness was claimant himself. The substance of his testimony is as follows: (1) As the northward back-up movement started, his flagman dropped off and walked toward his engine (presumably to later assist the head-end crew in picking up the loaded lumber car from the lumber company spur). (2) In the caboose claimant then stationed himself half-way between the north door of the caboose and the brake valve. (3) The brake valve was located "in the cupola in the center of the cab," but claimant "could have stepped easily to" said valve. (4) Claimant was watchful and had his train well under his control, being able to stop within one or two car lengths. The absence of back-up air hose on the rear platform of the caboose made only one-half car length difference in stopping ability. (5) Claimant heard No. 53's whistle and simultaneously saw it approaching around a curve about fifteen car lengths behind him. (6) No. 53 was coming "at an excessive rate of speed." (7) Upon seeing No. 53 coming, claimant "froze," then realized its speed, and decided that he did not have the time to take the "possibly five seconds" to pull the air and "still be able to get off the caboose before this engine ran through it." (8) Claimant jumped; and, "as soon as I hit I looked back and saw No. 53's engine as it struck my caboose."

As to the speed of No. 55 during the back-up movement, the testimony of both claimant and his head brakeman persuade the Division that the rate was about four miles per hour.

Petitioner makes a showing that, between the time when Claimant said he first saw No. 53 and the time of collision, No. 55's caboose moved about 70 feet. Then, at a speed of four miles per hour, which is 5.9 feet per second, claimant had about 11 seconds, from the time of seeing No. 53 until the moment of impact, in which to move from his position, pull the air, get to the platform, and jump. If his train's back-up speed was three miles per hour (4.4 feet per second), claimant had about 16 seconds in which to try to save both his train and himself. If the back-up speed was five miles per hour claimant had about nine seconds.

Would eleven seconds, the most probable amount of time, have been enough? Because of lack of information, the Division is unable to make a conclusive judgment. Some persons have slow reflexes and are paralyzed with indecision in the face of real or imagined imminent danger. Others have fast and immediate reaction times under almost any circumstances. The record affords no evidence of this sort about claimant, and in its absence the Division is not able to make a firm finding that claimant was, as carrier contends, not keeping an alert look-out when No. 53 first appeared, and was therefore negligent.

However, carrier's Rule 103, literally read, required that claimant's rear-end brakeman or flagman be stationed on the front of the caboose unless it be concluded that, as stated in the rule and its Note, claimant's backward-moving train was doing switching rather than making an extended movement within Peterman Yard.

Claimant permitted his flagman to drop off and walk back when the back-up began. The Division finds that, although the back-up was indeed part of the making up of No. 55, it was an unusual make-up and, because the head end crew had forgotten the lumber car, involved an extended rearward move of almost one-half mile, if completed. Therefore the exception to carrier's Rule 103 may not be said to be been applicable. And carrier properly found claimant guilty of violating said Rule.

This violation does not appear to have been merely technical. Claimant testified that he knew No. 53 was due. The presence of his brakeman could have insured against the possibility that claimant's own attention might have been somehow distracted from a careful rearward watch.

Carrier contends that claimant indeed did not keep a careful look-out and failed to see No. 53 until it was almost upon him. This contention of course is of major importance. As previously stated, no one but claimant could and did directly testify as to what claimant was doing in the caboose from the time the flagman dropped off until the time of the collision. But from the testimony of No. 53's crew carrier makes an inference or conclusion as to what claimant was doing. Said crew testified that from the moment they saw No. 55 their engineer had time to make a service application of their brakes, then an emergency application, and finally jump to the ground without injury. From this testimony carrier concludes that, if engineer Merritt had time to do those three things, conductor Davis would have had time to do two things—make his own emergency application and then leave his caboose. The Division finds that this conclusion or inference would be well-grounded if (1) claimant Davis' reac-

tion times were in general known to be as fast as those of engineer Merritt's; (2) his brake mechanism had been as accessible as that of Merritt's; and (3) he had been as habituated as Merritt to operating brake mechanisms. As to (1), the record provides no information. As to (2) and (3), there can be no doubt that Merritt's brake devices were much closer to his hand than claimant's, and his reactions had by experience been much more finely trained.

The conclusion from all of the foregoing must be that carrier succeeded in establishing only that claimant violated carrier's Rule 103 and thereby was in some unascertainable degree responsible for the collision of December 11, 1958. To this extent carrier's decision that claimant deserved some degree of discipline may not be judged to have been arbitrary or capricious.

The question remains, was the discharge, the supreme degree of discipline, merited? Or was this particular decision arbitrary, capricious, and discriminatory? This question has two prongs: (1) Was carrier's decision to dismiss claimant reasonably related to (a) the seriousness of the proven offense of violating Rule 103 and (b) claimant's past record? (2) Was said decision reasonably related to carrier's other decision, namely to give the other employe mainly involved, Engineer Merritt, a record suspension of sixty days?

As to the first prong, the Division would be reluctant to overturn carrier's decision. As to the second, however, there are persuasive reasons for doing so. This is to say, the record of carrier's investigation shows on balance that, as to the relative responsibilities of Merritt and claimant for the collision, carrier discriminated unreasonably against claimant and in favor of Merritt.

As previously stated, the record is full of conflicting testimony, especially that of No. 53's crew versus that of claimant. This Board has repeatedly said that it will not try to resolve such conflicts and that it will accept a carrier's evaluation and judgment if there is weighty evidence of record in support thereof. This is because the Division does not have the means for independently checking the evidence or for observing the witnesses. However, in the instant case the record itself contains information that warrants the Division's making its own evaluation—both of the conflicting testimony and of carrier's evaluation of same. Carrier presents two photographs of the wrecked cars in their post-collision positions. Claimant's backward movement was above found to have proceeded at the rate of about four miles per hour. The pictures show a completely smashed caboose and a pile-up of two empty gondolas and (partly) a box car over No. 53's engine. Much of the wood of the caboose was north of the front of No. 53's engine. The Division finds itself unable to conclude that this result could have obtained from No. 55's hitting the allegedly almost-stopped engine of No. 53, even though the brakes of the latter had been set in emergency. Carrier itself, according to the record, recommends a coupling of speed of four miles per hour. In the light of this evidence, the Division is compelled to conclude that the crew of No. 53 understated their speed, and Merritt's engine was not almost stopped at collision time; and accordingly, his responsibility for the accident was definitely not minor. Engineer Merritt and his crew had the same obligations to obey carrier's operating rules as had claimant and his crew, especially because No. 53 was in forward movement and was doing no setting out or picking up of cars at the time. In disciplining Merritt, carrier itself recognized these things.

Carrier disciplined Engineer Merritt only to the extent of a six-day record suspension. The Division finds his responsibility for the collision to have been akin to that of claimant's. Accordingly, the Division finds that carrier's action was discriminatory and in that sense arbitrary. The Division therefore is compelled to set aside carrier's discipline of claimant Davis. The latter shall be reinstated to carrier's service, with pay for all time lost and with all rights unimpaired; and carrier shall give him a record suspension of sixty days as of January 9, 1959.

AWARD: Claim sustained per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February 1961.

(The dissenting and supporting opinions of carrier and labor members are contained in the record at pages 38 and 65, respectively. Rule 231 (i).)

APPENDIX E

28 U.S.C.A., § 1337

§ 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

APPENDIX F

45 U.S.C.A., § 151a

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

APPENDIX G

45 U.S.C.A. § 153(i) through (p)

§ 153. National Railroad Adjustment Board

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjust-

ment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by

the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The Awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjust-

ment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

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Petitioners' Exhibit No. 10 (Photograph of the wrecked trains) 1b

Charts listing and analyzing reported cases in numerous federal courts involving enforcement proceedings under § 3 First (p) 3b–5b

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 494.

BROTHERHOOD OF RAILROAD TRAINMEN and A. W. DAVIS, *Petitioners*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINIONS OF COURTS BELOW AND DISSENTING OPINION IN AWARD OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The opinion of the United States District Court for the Northern District of Alabama denying motions for summary judgments and providing for a jury trial of the issues is reported in 211 F. Supp. 308.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 334 F. 2d 79.

The Award of the National Railroad Adjustment Board, together with the dissenting opinion, is reported in Vol. 147 of Awards of First Division, National Railroad Adjustment Board, Pages 665, *et seq.*, and is incorporated in the record herein (R. 31-38 and R. 38-65).

JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit is conferred by 28 U.S.C. § 1254(1) as set forth in the Petition for Writ of Certiorari.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW.

Is the District Court empowered, in a *de novo* proceeding, to set aside an award of the Adjustment Board which required that a railroad reinstate a discharged employee and pay him for time lost, and to enter judgment contrary to the findings and order of the Board, in an action for the enforcement of the order brought under the provisions of Section 3 First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p))?

STATUTES INVOLVED.

The pertinent Federal Statutes involved are listed in the Petition for a Writ of Certiorari (p. 3) and set forth in its appendix (pp. A23-A26).

COUNTER-STATEMENT OF THE CASE.

The Respondent Louisville and Nashville Railroad Company (herein called L&N) does not accept the statement of the case which appears at pages 4-6 of Petitioners' brief, but sets forth below its own counter-statement.

This action arose as the result of the discharge by the L&N of Petitioner, Conductor A. W. Davis, on January 9,

1959 (R. 147). Petitioner was dismissed from service by the L&N following its formal investigation to determine the responsibility for a serious train accident involving a collision between two L&N freight trains near Peterman, Alabama, on December 11, 1958 (R. 571-666).

A dispute thereafter arose between the L&N and Mr. Davis, represented by Petitioner Brotherhood of Railroad Trainmen (herein sometimes called "BRT" or the "Union") over dismissal of Mr. Davis. The Union claimed that Mr. Davis had no responsibility for the collision and that he was entitled to reinstatement and to a recovery of back pay. The L&N denied the claim, whereupon the Union submitted the dispute to the National Railroad Adjustment Board (R. 23, 89, 106).

The members of the Adjustment Board could not agree, and a referee was assigned to break the deadlock (R. 23, 89, 106). On February 17, 1961, the Adjustment Board, with the referee sitting as a member, issued its Award 19862 (R. 31-69). The referee found Mr. Davis guilty of violating the carrier's Rule 103 in ordering and in commencing an extended northward back-up movement of almost one-half mile without stationing the rear-end brakeman or flagman on the front (north end) of the caboose (R. 34). He further found that the violation was substantial, not merely technical, since Mr. Davis testified that he knew that another train (No. 53) was southbound on the same track and was then due (R. 35). The referee indicated very clearly that L&N's decision to dismiss Mr. Davis was reasonably related to the seriousness of the proven offense and Mr. Davis' past discipline record (R. 36). However, since the L&N had imposed only a sixty-

day record suspension[1] upon Mr. W. B. Merritt, the engineer of Train No. 53, the referee, being of the opinion that Mr. Merritt's responsibility for the collision was "akin" to that of Mr. Davis', held that the L&N's action in dismissing Mr. Davis ". . . was discriminatory and in that sense arbitrary" (R. 38). The referee concluded (R. 38):

> ". . . The latter [Mr. Davis] shall be reinstated to carrier's service, with pay for all time lost and with all rights unimpaired; and carrier shall give him a record suspension of sixty days as of January 9, 1959."

On February 17, 1961, pursuant to the provisions of Section 3 First (o) of the Railway Labor Act (45 U.S.C. §153 First (o)), the Adjustment Board issued its order to the carrier to make the Award effective (R. 70). The L&N declined to place the award in effect because it considered the award to be arbitrary and capricious and also dangerous—dangerous considering the safety of its employees, the public and its property. The L&N further believed that the referee had no basis for attempting to equate the discipline imposed upon Mr. Davis with that given to Mr. Merritt. The L&N believed that the referee, not having heard the witnesses, acted arbitrarily in attempting to resolve conflicts in the evidence[2] and that this led to his

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[1] A "record suspension" on the L&N is an entry on the employee's discipline record and does not involve an actual suspension from work. A "sixty-day record suspension" is the highest discipline administered on the L&N short of actual discharge. Such record entries are used by L&N officials in assessing the extent of discipline that should be imposed in the event of future violations by the employee of the carrier's rules or instructions (R. 199).

[2] In the present award, the Board confessed (R. 37):

> "As previously stated, the record is full of conflicting testimony, especially that of No. 53's crew versus that of claimant. This Board has repeatedly said that it will not try to resolve such conflicts and that it will accept a carrier's evaluation and judgment if there is weighty evidence of record in support thereof."

erroneous conclusion that the responsibility of the two employees was "akin."

Further, even assuming that the two men were equally responsible for the collision, it is undisputed that when the members of the Adjustment Board and the referee were considering the claim of Mr. Davis, they had before them the past discipline record of Mr. Davis, which record was bad, but did not have the past discipline record of Mr. Merritt (R. 64, 107). The referee obviously recognized the fact that Mr. Davis' past record was not good (R. 36). Moreover, in the dissenting opinion, it is stated (R. 64):

> "Having thus gone contrary to a long line of previous holdings that it is not the duty or the function of this Division to weigh evidence, the referee then proceeds to another grave error. He takes it upon himself to decide that where two men are involved in an accident, they must both receive the same discipline, regardless of their previous service records. In this case the claimant's record reflects numerous rules violations, some of a grave and serious nature. Yet the referee decides the claimant must not be disciplined any more severely than the engineer of the other crew, regardless of the fact that insofar as the record reflects, the engineer had a clear record. Such findings are completely contrary to numerous awards to the effect that it is entirely proper to consider a man's past record in determining the amount of discipline to be assessed."[1]

Recognizing the seriousness of retaining in its employ a trainman who had, on this occasion[2] and in the past,

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[1] In the trial of this case in the District Court, the jury had before it the past discipline records of both Mr. Davis and Engineer Merritt (Respondent's Exhibits Nos. 2 and 3, R. 200, 203; Petitioners' Exhibit No. 13, R. 544-545).

[2] The seriousness of the collision is shown by Petitioner's Exhibit No. 10 (R. 172), which is reproduced in Respondent's Appendix, p. 1b. Except for the abandonment of their trains at the last moment, it could easily have killed or seriously injured four employes, including Petitioner Davis.

demonstrated an utter lack of regard for the carrier's operating rules and other rules, the L&N management declined to comply with the Adjustment Board order. Petitioners brought the present action for enforcement under the provisions of 45 U.S.C. § 3 First (p).

The L&N filed with the District Court certified copies of the record before the Adjustment Board and of Award 19862 and moved for summary judgment (R. 103-105). Petitioners also moved for summary judgment (R. 108-111). The Court denied both motions (R. 117).

The parties, at a pre-trial conference, agreed that the following was the only issue in controversy (R. 120-121):

> "Whether Davis was discharged without just cause would seem to depend upon whether he was discriminated against after considering all of the evidence relevant to the degree of fault on the part of both Davis and Merritt *as well as the previous record of each of them.*" (Emphasis added.)

Counsel for all parties also agreed (R. 121-123) that a jury should determine the issue as to whether Mr. Davis was discharged without just cause, and, if the jury determined that he was discharged without just cause, that the Court should then determine the amount of money due.

The case came on for trial before the Court, sitting with a jury, upon the issue agreed upon by the parties (R. 120-121, 125).

Under the instructions of the Court that the L&N had the burden of proving that there was just cause for the discharge of Mr. Davis (R. 563), the jury returned a verdict in favor of the L&N (R. 124). The jury having so decided the wrongful discharge issue concerning Mr. Davis' *entitle-*

ment to any relief, there was no issue remaining involving the *computation* of the amount of money due for submission to the Court.

The Judgment of the District Court entered pursuant to the verdict of the jury was affirmed on appeal. *Brotherhood of R. Trainmen, et al.* v. *Louisville & N. R. Co.*, 334 F. 2d 79. The petition to this Court followed.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

The Petition for a Writ of Certiorari Should Be Denied Because the Court of Appeals Correctly Interpreted the Railway Labor Act.

The only basis relied upon by Petitioners in their complaint for the District Court's jurisdiction of this action was § 3 First (p) of the Railway Labor Act (45 U.S.C. § 153 First (p)). (R. 21). No reliance in plaintiffs' complaint was placed upon 28 U.S.C. § 1337 giving district courts jurisdiction of any civil action or proceeding arising under Acts of Congress regulating commerce. It was not until the Petition for a Writ of Certiorari that jurisdiction was claimed to have been conferred upon the District Court by that statute (p. 5).

Not only did Petitioners rely upon Section 3 First (p) of the Railway Labor Act as conferring jurisdiction upon the District Court; they predicated their right to the relief sought upon that section of the Act (R. 25, 27, 29).

Section 3, First (p) provides as follows:

> "If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District

Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

Petitioners now ask this Court to hold that § 3 First (m) of the Railway Labor Act (45 U.S.C. § 153 First (m)) divested the Court of the power to review the non-money portion of the Adjustment Board's award (although conceding it has power to review the money portion of it) in the enforcement suit brought pursuant to § 3 First (p).

Sections 3 First (m) and (p) were made a part of the Railway Labor Act by the Amendment of that Act passed June 21, 1934. *We shall show that in the thirty years that these sections have been in effect, not one Court has held that it was prohibited by § 3 First (m) to hear de novo a suit to enforce an Adjustment Board award in an action*

instituted under § 3 First (p), but numerous Courts of the highest respectability have held the contrary. For the convenience of the Court we insert (Appendix, pp. 3b-5b) charts listing thirty-seven reported cases (all we have been able to find) in numerous federal courts involving enforcement proceedings brought under § 3 First (p) of the Act. The list includes all types of awards of the Adjustment Board, including reinstatement and back pay awards. In not a single one of these reported cases did the Court hold that it was without power to review all aspects of the Board's awards in a *de novo* proceeding.

In addition to those listed cases in which enforcement of awards was sought, there are other cases in which Adjustment Board awards were involved or in which they were discussed by the Court. The interpretation of the Railway Labor Act now urged by Petitioners has been rejected by every Court which has considered it. We discuss now some of the major cases involving this point.

IN THE THIRTY YEARS OF ENFORCEMENT PROCEEDINGS INSTITUTED UNDER THE PROVISIONS OF § 3 FIRST (p), THE LAW HAS BEEN WELL SETTLED THAT, WHEN THE ENFORCEMENT REMEDY IS INVOKED, ALL ASPECTS OF AN AWARD OF THE ADJUSTMENT BOARD ARE REVIEWABLE BY THE DISTRICT COURTS UNDER THE EXPRESS TERMS OF THAT SUBSECTION AND THAT COURTS ARE NOT POWERLESS TO ENTER A JUDGMENT IN SUCH PROCEEDINGS CONTRARY TO THE FINDINGS OF THE BOARD.

The law is well settled that § 3 First (m) does not divest the Court of the power to review non-money awards in an enforcement suit under § 3 First (p).

THE U. S. SUPREME COURT AND DISTRICT OF COLUMBIA CIRCUIT.

This Court affirmed the case of *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (1941). The opinion in that case was written for the Court of Appeals for the District of Columbia by then Judge Rutledge, who was soon to become a Justice of the Supreme Court and who was therefore unable to sit with that court when it affirmed the Circuit Court, 319 U. S. 732 (1943). The *non-money* award of the Adjustment Board involved a jurisdictional dispute between certain employees concerning the right to certain work. The Court held that a declaratory judgment would not lie and that the review of Adjustment Board awards provided by §3 First (p) was intended to be the exclusive method of review.

In answer to the carrier's contention that rejecting its declaratory judgment suit would deny protection of its rights guaranteed by the Constitution, the Court of Appeals said (pp. 244-245):

> "Much of the argument has been built around the alleged inadequacy of the administrative proceeding as complying with the requirements of due process, particularly in the absence of formal pleadings, opportunity for examining witnesses and cross examining them, opportunity for representation by counsel and for oral argument. These things would be important, if the Board's decisions were final in the legal sense and for purposes of enforcement, as to either facts or law. But, as has been shown, they have no such quality. Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights. The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit de novo. In the suit the cause of action is upon the award, to secure its enforcement.

But the parties are not limited by its provisions in the trial. The employee must set forth 'the causes for which he claims relief' and the Board's order, 45 U.S.C.A. § 153, First (p). The suit must 'proceed in all respects as other civil suits,' except that the order and findings 'shall be prima facie evidence of the facts therein stated.' Ibid. The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one. That is hardly disputed. The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

Among the cases referred to by the Court as supporting its opinion is *Cook* v. *Des Moines Union Ry.*, 16 F. Supp. 810 (S.D. Iowa, 1936). That case is noteworthy because it is the first reported case involving an Adjustment Board award, and up to the present time not one Court has disagreed with its findings.

The *Cook* case involved a non-money portion of the Award—a jurisdictional dispute. In connection with the issue that the carrier was deprived of its constitutional rights, the Court held (pp. 813-814):

"The statement in the act that the award shall be final and binding upon both parties to the dispute does not result in this case in depriving the Des Moines Union Railway Company of any constitutional rights or refuse to it the right of due process of law.

"It is unnecessary to determine whether or not this might be a depriving of due process in certain cases, but here certainly the Des Moines Union is not deprived of any constitutional rights. The purport of the act may be to provide that the award made by an

Adjustment Board shall be final so long as it is not attempted to be enforced. No provision is made in the act for the enforcement of any award or decision of the Adjustment Board, and therefore there is no deprivation by the railway company of any rights unless and until the suit is filed in the District Court of the United States for its enforcement. When this is done it becomes an action at law with the right of a jury. The entire case is open for trial as a law action on the original suit. The case here is one which has long been known to the law as a breach of contract and, whether the provision with reference to the action before the District Court of the United States is considered as a review or the enforcement of an award only, it affords to the carrier, especially in this case, every right which it would have had the action been originally brought in this court for breach of contract, other than the question of evidence as to the presumption of the findings of the board, and it has been held so often that the Legislature may provide for presumption in certain cases with reference to evidence that the citation of authorities is not necessary to show that such a provision is not a deprivation of the due process of law or an invasion of constitutional rights."

In *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943), the Court, in holding that Congress, by implication, had prohibited judicial review of the National Mediation Board's rulings under § 2 Ninth of the Railway Labor Act, was influenced by the fact that Congress in the Act had made express provision for judicial review of Adjustment Board Awards under § 3 First (p) and under § 9. The Court stated (p. 306):

"When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The

language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act."

SECOND CIRCUIT.

The case of *Hanks* v. *Delaware & H. R. Corp.*, 63 F. Supp. 161 (N.D. N.Y., 1945), was a suit under § 3 First (p) to enforce an Adjustment Board Award which required that a certain position be re-established and a payment of money made to the claimant. Relying upon the *Boswell* case, *supra*, the Court stated that the finding and order of the Board were "fairly comparable to expert testimony" (p. 164).

THIRD CIRCUIT.

One of the leading cases involving the enforcement of Adjustment Board Awards is *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. 2d 121 (C.A. 3, 1943). It involved an award relating to seniority rights—a non-money award. The Court commented on the legislative history that resulted in the 1934 amendments to the Act, stating (p. 123):

> "The reason for the choice of the words 'final and binding' will appear from the history of legislation providing for mediation of railway labor disputes. Under both the Act of May 20, 1926, 45 U.S.C.A. § 151 et seq. and the Transportation Act of 1920, 41 Stat. 456, as well as the system of labor mediation which was created during the first world war when the railroads were under federal control, the boards had advisory powers only. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 43 S. Ct. 278, 67 L. Ed. 536. Under the Act of 1926 their awards could be given some practical effect, but only by stipulation. These provisions were not entirely successful

and it is plain that the words in question adopted by the framers of the Act of 1934 make the decisions of the Board more efficacious than mere private advice. In this, however, there cannot be found an intention to invest them with the force of unappealable judicial decisions."

In rejecting the claim that the Court was without jurisdiction to review the award on its merits based upon the provisions of § 3 First (m) of the Act, the Court said (p. 122):

"In construing a statute, words may not be taken out of their context and endowed with an absolute quality nor may the plan of the entire statute be disregarded in interpreting any single provision. Obviously the expression 'final and binding' has its limitations. Even the appellants concede that the award is neither so final that it may not be set aside by the Court if the Board acted beyond its statutory authority nor so binding that the carrier can be compelled to obey it without the aid of the Court in enforcement proceedings. We think that the general plan of the statute clearly discloses an intention to use the words in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law.

"The Act provides that the suit for enforcement shall 'proceed in all respects as other civil suits' except that the findings and award 'shall be prima facie evidence of the facts therein stated.' Section 3(p), 45 U.S.C.A. § 153(p). These procedural directions are particularly appropriate to a trial on the merits of disputed issues of both fact and law; less so to a mere examination of the scope of the Board's authority."

The Court also considered the constitutional issue and stated (p. 123):

"If the Act should be interpreted as precluding consideration of the merits by the Court, serious doubts as to its constitutionality would arise. Such interpretation would amount to vesting the Board with full judicial power; and, as was said in a similar but other connection in the dissenting opinion in Washington Terminal Co. v. Boswell, 75 U. S. App. D.C. 1, 124 F. 2d 235, 276, 'There can be no valid delegation of governmental power to nongovernmental agencies. Carter v. Carter Coal Co., 1936, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160. The Adjustment Board, consisting of bi-partisan groups paid by and set up to represent the employees and carriers respectively, is not a governmental agency.'"

We also invite the Court's attention to the case of *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C.A. 3, 1951), a case involving reinstatement and back pay. After discussing the operation of the Adjustment Board, the Court commented that the facts were not conclusively established by its findings.

FOURTH CIRCUIT.

The Fourth Circuit has also considered the enforcement of Adjustment Board awards under § 3 First (p) in the case of *Brotherhood, etc.* v. *Atlantic Coast Line R. Co.*, 253 F. 2d 753 (C.A. 4, 1958). The case involved reinstatement and back pay, and the Court held that the findings and order of the Board were not binding on it; that they were only *prima facie* evidence of the facts contained in them.

FIFTH CIRCUIT.

In the very recent case of *Jones* v. *Central of Georgia Railway Co.*, 331 F. 2d 649 (C.A. 5, 1964), the Court held (p. 654):

"The ultimate question involved is the meaning of the phrase 'final and binding' as used in subsection (m). Boswell, Dahlberg, Hodges, Brotherhood v. A.C.L., and numerous other cases herein cited, hold that it does not mean that non-money awards of the Board cannot be reviewed by the courts on a petition seeking enforcement."

Of like effect are the cases of *Estes* v. *Union Terminal Co.*, 89 F. 2d 768 (C.A. 5, 1937); *Ward* v. *New Orleans Public Belt Railroad Commission*, 97 F. Supp. 1002 (E.D. La., 1951), affirmed 195 F. 2d 829 (C.A. 5, 1952); and *Hodges* v. *Atlantic Coast Line Railroad Co.*, 310 F. 2d 438 (C.A. 5, 1962).

SIXTH CIRCUIT.

Judge Potter Stewart, now Mr. Justice Stewart of this Court, was a member of the panel that decided the case of *Brotherhood, etc.* v. *Railway Express Agency*, 238 F. 2d 181 (C.A. 6, 1956). Involved was an Adjustment Board award ordering the reinstatement of an employee and payment for his time lost. The District Court refused to enforce the Award. The Court of Appeals affirmed and held (p. 185):

"It is also urged that the District Court is not authorized to set aside the award of the Railroad Adjustment Board. The statute, 45 U.S.C. § 153 (p), 45 U.S.C.A. § 153(p), provides that, while the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, the district courts are empowered, 'under the rules of the court governing actions at law, * * * to enforce or set aside the order of the division of the Adjustment Board.' This is not a case where the District Court has invaded jurisdiction conferred on the Adjustment Board by the Railway Labor Act. Cf. Slocum v. Delaware, Lackawanna & Western Railroad Co., 339 U. S.

239, 70 S. Ct. 577, 94 L. Ed. 795. The Agency has been given, in compliance with the statute, the first opportunity to pass on the issues. Cf. Order of Railway Conductors of America v. Pitney, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318. The case had full hearing, both before the Board and in the District Court, under the express statutory authority. We recognize that the Agency carries the burden of showing that the award of the Adjustment Board is wrong. Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928."

The Petitioners herein rely upon the *Slocum* and *Pitney* cases to bolster their contention that a Court is without power to set aside a non-money award of the Board. Both of these cases were considered in the case last cited.

Also, please see the case of *Thomas* v. *New York, Chicago & St. Louis R. Co.*, 185 F. 2d 614 (C.A. 6, 1950), affirming the District Court's refusal to enforce an Award of the Adjustment Board that ordered the reinstatement of an employee.

SEVENTH CIRCUIT.

The Court refused to enforce an Adjustment Board award involving the seniority standing of certain employees—a non-money award—in the case of *Railroad Yardmasters* v. *Indiana Harbor Belt R. Co.*, 166 F. 2d 326 (C.A. 7, 1948). It held that there would be no remedy to enforce an award had Congress not provided an enforcement remedy by § 3 First (p).

EIGHTH CIRCUIT.

The case of *Boos* v. *Railway Express Agency*, 153 F. Supp. 14 (D.S.D.; 1957), affirmed 253 F. 2d 897 (C.A. 8, 1958), was an action to enforce an Adjustment Board award

for restoration to an abolished position and compensation for salary lost. The Court refused to enforce. It was held that the trial in the District Court was a trial *de novo*.

NINTH CIRCUIT.

The recent case of *Callan* v. *Great Northern Railway Company*, 299 F. 2d 908 (C. A. 9, 1961), involved facts strikingly similar to the facts in the instant case.

Callan's discharge was the result of the collision of a train and a string of boxcars. He appealed to the Adjustment Board and that Board determined that the discipline was excessive. It ordered that he be reemployed and compensated for lost time less a 60-day suspension. Callan filed suit for enforcement of the Award and from an adverse jury verdict appealed.

The Court of Appeals affirmed the judgment of the District Court and, among other holdings, approved an instruction that had been given the jury. The instruction set out that by bringing an enforcement suit the petitioner laid before the Court the question of whether or not the award should be enforced; that the findings of the Board were *prima facie* evidence of the facts but that those findings were rebuttable by other evidence; that both sides had the right to introduce any material evidence available to them; and that the one disputing the correctness of the award had the burden of proving its incorrectness.

UNIFORMITY OF OPINIONS OF ALL COURTS.

Every Court that has considered the question has held that *all* awards of the National Railroad Adjustment Board are subject to judicial review. They have consistently exercised the power to set aside awards—money and non-

money awards—when the facts warranted such action. Not one Court has held it lacked that authority.

The appended charts list 37 cases which are all the cases we have been able to find that involved the enforcement of Adjustment Board Awards in any manner. We believe that the wisdom of Congress in providing for judicial review of Board awards is shown by the fact that in the 30 cases in which a Court ordered or denied enforcement, enforcement was ordered in only 7 and denied in 23.

THE SETTLED AND CONSISTENT INTERPRETATION OF THE RAILWAY LABOR ACT BY NUMEROUS FEDERAL COURTS HAS NOT BEEN OVERTURNED BY ACT OF CONGRESS NOR BEEN OVERRULED BY THE LANGUAGE APPEARING IN BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL. v. LOUISVILLE & N. R. CO., 373 U. S. 33.

If the Courts have mistaken the legislative intent in this statute, ample opportunity has been had by Congress to make its meaning clear. The contention of Petitioners that the decision of the Court of Appeals in the instant case conflicts with the decisions of this Court, or for that matter, the consistent opinions of every U. S. District Court or U. S. Court of Appeals that has considered the question is erroneous. To support their contention, Petitioners rely upon only one decision that directly involves the enforcement of an Adjustment Board award, namely, the case of *Brotherhood of Locomotive Engineers, et al.* v. *Louisville & N. R. Co.*, 373 U. S. 33. That decision neither conflicts with nor overrules the vast body of law holding that § 3 First (p) provides for a trial *de novo* for the enforcement of Adjustment Board awards and that § 3 First (m) does not divest Courts of power to hold such trials.

Petitioners' argument is premised almost entirely upon language which has been isolated by Petitioners from the

facts involved in that case and from the issue there before the Court. Petitioners especially rely upon its dissenting opinion. It must be remembered that, there, the non-money portion of the Adjustment Board award had been settled and disposed of and only the money part of it remained. The sole question before the Court was whether § 3 First (p) was the exclusive procedure for the enforcement of the money portion of the award or whether a strike could be called to enforce it.

We are not so presumptuous as to endeavor to tell this Court what it intended by its opinion in that case. We do believe it proper, however, to suggest that it did not hold that because of § 3 First (m) a court has no power to review a non-money award in a trial *de novo* as provided by § 3 First (p), which has no language restricting it to money awards. We ask the Court's indulgence in our here quoting from its opinion, language which we believe substantiates our reading of the opinion.

Speaking of Adjustment Board awards *generally*, it was said (pp. 37-38):

> ". . . And finally, subsections (o) and (p) describe the manner in which Adjustment Board awards may be enforced, providing for the issuance of an order by the Board itself and for judicial action to enforce such orders. The several decisions of this Court interpreting § 3 First have made it clear that this statutory grievance procedure is a *mandatory, exclusive and comprehensive* system for resolving grievance disputes. . . ." (Our Emphasis.)

This Court also said (p. 38):

> ". . . Similarly, an employee is barred from choosing another forum in which to litigate claims arising under the collective agreement. *Pennsylvania*

R. Co. v. *Day*, 360 U. S. 548, 552-553. A corollary of this view has been the principle that the process of decision through the Adjustment Board cannot be challenged collaterally by methods of review not provided for in the statute. . . . The decision in that case [*Union Pacific R. Co.* v. *Price*, 360 U. S. 601] was based upon the conclusion that, when invoked, the remedies provided for in § 3 First were intended by Congress to be the *complete and final means* for settling minor disputes. 360 U. S. at 616-617. See also, *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D.C. 1, 124 F. 2d 235 (per Rutledge, J.), aff'd. by an equally divided court, 319 U. S. 732." (Our Emphasis.)

To conclude that § 3 First (p), which makes no distinction between a money and non-money award, is confined to money awards and that it does not apply to the enforcement of other awards because the Court stated that it was the exclusive procedure for the enforcement of money awards is a manifest *non sequitur*.

We cannot believe that this Court desired to overrule a consistent and longstanding body of law—holding that § 3 First (m) does not deprive federal courts of the power to review, in a *de novo* trial, any award of the Adjustment Board in an enforcement suit provided for by § 3 First (p)—in a case wherein the precise question was not involved, and without so much as mentioning a single one of the numerous decisions which have so consistently followed the principle that non-money awards are also reviewable under the express statutory provisions of § 3 First (p). To the contrary, the Court cited *with approval* one of the early cases which helped bring this large body of law into existence, *viz.*: *Washington Terminal Company* v. *Boswell*, 124 F. 2d 235 (1941), affirmed 319 U. S. 732.

In the *Boswell* case, the carrier was precluded from maintaining a declaratory judgment action to declare a non-money award void because, the Court stated, the award could only be reviewed under § 3 First (p).

THE STATUTORY PROCEDURE OF SECTION 3 FIRST OF THE RAILWAY LABOR ACT FOR THE DETERMINATION OF DISPUTES INVOLVING THE INTERPRETATION OF COLLECTIVE BARGAINING AGREEMENTS IN THE RAILROAD INDUSTRY DIFFERS FROM THAT APPLICABLE TO ARBITRATION OF CONTRACT DISPUTES BETWEEN EMPLOYERS AND EMPLOYEES COVERED BY THE NATIONAL LABOR RELATIONS ACT AND THOSE OTHERWISE OUTSIDE THE COVERAGE OF SECTION 3 FIRST.

Relying on the so-called Steelworkers Trilogy,[1] Petitioners argue that the federal policy is one of final settlement of labor disputes by arbitration. We submit that reliance upon such cases is misplaced for the reason that § 3 First of the Railway Labor Act has no counterpart in the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*).

By the enactment of § 3 First, Congress has provided a detailed and comprehensive statutory grievance procedure. In summarizing so much of this statutory plan as relates to what happens after the entry of an Adjustment Board Award, the Court in *Brotherhood of Locomotive Engineers, et al.* v. *Louisville & N. R. Co.*, 373 U. S. 33, stated (p. 37):

"It further directs the Adjustment Board to entertain a petition for clarification of its award if a dis-

[1] *United Steelworkers of America* v. *American Manufacturing Company*, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Company*, 363 U. S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

pute should arise over its meaning. And finally, subsections (o) and (p) describe the manner in which Adjustment Board awards may be enforced, providing for the issuance of an order by the Board itself and for judicial action to enforce such orders."

The Court continued (pp. 38-39):

"In *Union Pacific R. Co.* v. *Price*, 360 U. S. 601, the Court held that an employee could not resort to a common law action for wrongful discharge after the same claim had been rejected on the merits in a proceeding before the Adjustment Board. The decision in that case was based upon the conclusion that, when invoked, the remedies provided for in § 3 First were intended by Congress to be the complete and final means for settling minor disputes. 360 U. S. at 616-617. See also, *Washington Terminal Co.* v. *Boswell*, 75 U. S. App. D.C. 1, 124 F. 2d 235 (per Rutledge, J.), aff'd by an equally divided court, 319 U. S. 732."

It is clear that the statutory enforcement procedure is an integral part of the entire statutory process of § 3 First. In the *Boswell* case, the Court stated (p. 242):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision."

The Court continued (p. 246):

"In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it.

> If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

We submit that no proper analogy may be drawn between the statutory plan of § 3 First and enforcement of arbitration awards made pursuant to the terms of a private contract negotiated under the National Labor Relations Act, as amended. In *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30 (1957), the Court stated (pp. 31-32, note 2):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. § 151, et seq. It is one of those differences which underlies the controversy in this case."

Please see also *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962).

Precisely the same argument advanced here by Petitioners was made in the case of *Brotherhood of Railway and Steamship Clerks* v. *Atlantic Coast Line Railroad Co.*, 253 F. 2d 753 (C.A. 4, 1958). In rejecting the argument, Judge Parker had this to say (pp. 757-758):

> "If it had been intended, as appellant argues, that the orders of the Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under Section 153 from that made for enforcement of arbitration awards entered under the existing

statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

THERE IS NO UNFAIRNESS IN THE ESTABLISHED PRINCIPLE THAT A DISCHARGED EMPLOYEE CANNOT MAINTAIN A COMMON LAW ACTION FOR DAMAGES AFTER RECEIVING AN ADVERSE AWARD FROM THE BOARD AND THE ESTABLISHED LAW THAT A COURT, UNDER SECTION 3 FIRST (p), HAS THE POWER TO REVIEW THE ENTIRE WRONGFUL DISCHARGE ISSUE AFTER AN AWARD FAVORABLE TO THE EMPLOYEE.

Petitioners assert unfairness in allowing a railroad to secure a court review of any award adverse to it but denying a review of an award in its favor.

This claim was pointedly answered by this Court in the case of *Union Pacific R. Co.* v. *Price*, 360 U. S. 601 (1959). In that case the Court held (pp. 615-616):

> ". . . The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicity created by Congress, and it is for Congress to say whether it ought be removed."

This express invitation to Congress has not been accepted.

A discharged employee has the absolute right under the Railway Labor Act, subject only to state procedural requirements, to treat his employment relationship wholly at an end and to sue as for breach of any other contract, and there is nothing that the railroad can do which can detract from the employee's right to pursue to the end a judicial determination of his breach-of-contract suit. Clearly then, a discharged employee has the opportunity for the fullest day in court at the very outset. It is clear

that a discharged employee can have no just complaint if, at the end, the carrier has its opportunity for judicial review of arbitrary rulings of the Board.

PETITIONERS ADMIT THAT THERE PROPERLY ARE EXCEPTIONS TO THE FINALITY AND REVIEWABILITY OF NON-MONEY AWARDS.

Petitioners state (p. 15) that they do not contend that non-money awards are never reviewable. They say that an award should be set aside by a court when, for example, the award of the Board is arbitrary. The Board found (Appendix to Petition, p. A19; R. 34-35) that Mr. Davis violated the Company rule—not merely a technical violation—in making an unusual back-up movement of almost a half-mile without providing the required protection for his train or for that matter to prevent a collision with No. 53, which he knew was due and to his rear.

We earnestly submit that it was highly arbitrary to order the reinstatement of Petitioner, A. W. Davis. He was ordered reinstated not because he was not guilty of violating the company rules in a most serious respect—his violation was even held not technical—but because the discipline administered was more severe than that imposed upon the engineer of the train he collided with (Appendix to Petition, p. A22; R. 38). The Board endeavored to equate the discipline despite the fact that it had the service record of Davis, which was bad (R. 64), before it but not the service record of the engineer.

Surely it was arbitrary to order the reinstatement of a man whose complete disregard for the carrier's rules was a prime factor in causing a serious railroad wreck, especially so when his past record shows much disregard for company rules.

It was not the intent of Congress that a railroad could not protect itself from an employee who fails to comply with its rules but must keep him in its employ even though it is under a strict duty to provide a safe place to work and prevent injury to its employees, passengers and the public. A requirement that such a man be retained in the service is therefore arbitrary.

CONCLUSION.

The decision of the Court of Appeals is correct. No unsettled question of importance is presented and there is no conflict of decisions. Accordingly, a Writ of Certiorari should not issue.

Respectfully submitted,

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PETITIONER'S EXHIBIT No. 10

SUITS IN THE UNITED STATES COURTS TO ENFORCE NATIONAL RAILROAD ADJUSTMENT BOARD AWARD

	Style	District Court	Date	Court of Appeals	Date	N.R.A.B. Award Reviewed by Court and Enforced or Denied on Merits	N.R.A.B. Award Not Reviewed by Court Because of Being Final and Binding	Enforcement Ordered	Enforcement Denied	
Second Circuit	Hanks v. Delaware & H. R. Corp.	63 F. Supp. 161	1945			Yes		Yes		
" "	Crowley v. Delaware & H. R. Corp.	63 F. Supp. 164	1945			Yes			Yes	
" "	Joint Council Dining Car Employees v. Delaware, L. & W. R. Co.	Not Reported		157 F. 2d 417	1946					The only ques of limitations of Appeals h returned the
Third Circuit	Dahlberg v. Pittsburgh & L. E. R. Co.	Not Reported		138 F. 2d 121	1943	Yes			Yes	
" "	Kirby v. Pennsylvania R. Co.	92 F. Supp. 417	1952	188 F. 2d 793	1951					District Court enforce and it the cause of a The Court of trict Court to
" "	Brotherhood of Railway & Steamship Clerks v. Pennsylvania R. Co.	107 F. Supp. 924	1952							Motion to dis and placed on
" "	Powell v. Pennsylvania R. Co.	166 F. Supp. 448	1958							The suit was
Fourth Circuit	Virginian Ry. Co. v. System Federation No. 40, Etc.	Not Reported		131 F. 2d 840	1942	Yes		Yes		
" "	Atlantic Coast Line R. Co. v. Brotherhood of Ry. & S. S. Clerks, Etc.	Not Reported		210 F. 2d 812	1954	Yes			Yes	
" "	Brotherhood of Ry. Clerks, Etc. v. Atlantic Coast Line R. Co.	154 F. Supp. 71	1957	253 F. 2d 753	1958	Yes			Yes	
" "	Hanson v. Chesapeake & O. Ry. Co.	198 F. Supp. 325	1961							The District dismiss and of the award
Fifth Circuit	Estes v. Union Terminal Co.	Not Reported		89 F. 2d 768	1937					District Court the N.R.A.B. its hearings. ase for trial
" "	Smith v. Texas & N. O. R. Co.	32 F. Supp. 1013	1940			Yes			Yes	
" "	Thomas v. Texas & N. O. R. Co.	Not Reported		118 F. 2d 75	1941				Yes	
" "	System Federation No. 59, Etc. v. Louisiana & A. Ry Co.	30 F. Supp. 909 34 F. Supp. 89 Rehearing Denied	1940 1940	119 F. 2d 509	1941	Yes			Yes	Certiorari de L. Ed. 526.
" "	Railway Express Agency v. Order of Railroad Telegraphers	Not Reported		137 F. 2d 46	1943	Yes			Yes	
" "	Crist v. Public Belt R. R. Commission	93 F. Supp. 103	1950			Yes		Yes		
" "	Ward v. New Orleans Public Belt Railroad	97 F. Supp. 1002	1951	195 F. 2d 829	1952	Yes		Yes		

SUITS IN THE UNITED STATES COURTS TO ENFORCE NATIONAL RAILROAD ADJUSTMENT BOARD AWARDS.

Style	District Court	Date	Court of Appeals	Date	N.R.A.B. Award Reviewed by Court and Enforced or Denied on Merits	N.R.A.B. Award Not Reviewed by Court Because of Being Final and Binding	Enforcement Ordered	Enforcement Denied	Comment
ks v. Delaware & H. R. p.	63 F. Supp. 161	1945			Yes		Yes		
wley v. Delaware & H. R. p.	63 F. Supp. 164	1945			Yes			Yes	
t Council Dining Car ployees v. Delaware, W. R. Co.	Not Reported		157 F. 2d 417	1946					The only question presented was whether the statute of limitations barred the enforcement suit. Court of Appeals held that limitations had not run and returned the case for trial on the merits.
lberg v. Pittsburgh . E. R. Co.	Not Reported		138 F. 2d 121	1943	Yes			Yes	
by v. Pennsylvania R. Co.	92 F. Supp. 417	1952	188 F. 2d 793	1951					District Court held the award was too indefinite to enforce and it dismissed the complaint as not stating the cause of action on which relief could be granted. The Court of Appeals reversed and ordered the District Court to hear the case on the merits.
therhood of Railway & mship Clerks v. Pennsyl- a R. Co.	107 F. Supp. 924	1952							Motion to dismiss was denied by the District Court and placed on the calendar for trial on the merits.
ell v. Pennsylvania R. Co.	166 F. Supp. 448	1958							The suit was settled by stipulation.
ginian Ry. Co. v. System eration No. 40, Etc.	Not Reported		131 F. 2d 840	1942	Yes		Yes		
ntic Coast Line R. Co. v. therhood of Ry. & S. S. ks, Etc.	Not Reported		210 F. 2d 812	1954	Yes			Yes	
therhood of Ry. Clerks, v. Atlantic Coast Line o.	154 F. Supp. 71	1957	253 F. 2d 753	1958	Yes			Yes	
son v. Chesapeake & O. Co.	198 F. Supp. 325	1961							The District Court denied the railroad's motion to dismiss and the case was set for trial on the merits of the award.
s v. Union Terminal Co.	Not Reported		89 F. 2d 768	1937					District Court had dismissed the suit for failure of the N.R.A.B. to place certain employees on notice of its hearings. The Court of Appeals returned the case for trial on the merits of the award.
th v. Texas & N. O. R. Co.	32 F. Supp. 1013	1940			Yes			Yes	
mas v. Texas & N. O. R.	Not Reported		118 F. 2d 75	1941				Yes	
em Federation No. 59, v. Louisiana & A. Ry Co.	30 F. Supp. 909 34 F. Supp. 89 Rehearing Denied	1940 1940	119 F. 2d 509	1941	Yes			Yes	Certiorari denied 314 U. S. 656, 62 S. Ct. 108, 86 L. Ed. 526.
way Express Agency v. er of Railroad graphers	Not Reported		137 F. 2d 46	1943	Yes			Yes	
t v. Public Belt R. R. mission	93 F. Supp. 103	1950			Yes		Yes		
d v. New Orleans Public Railroad	97 F. Supp. 1002	1951	195 F. 2d 829	1952	Yes		Yes		

SUITS IN THE UNITED STATES COURTS TO ENFORCE NATIONAL RAILROAD ADJUSTMENT BOARD AWARDS (Continu

	Style	District Court	Date	Court of Appeals	Date	N.R.A.B. Award Reviewed by Court and Enforced or Denied on Merits	N.R.A.B. Award Not Reviewed by Court Because of Being Final and Binding	Enforcement Ordered	Enforcement Denied	
Fifth Circuit	Smith v. Louisville & N. R. Co.	112 F. Supp. 388	1953			Yes			Yes	
" "	Hodges v. Atlantic Coast Line Railroad Company			310 F. 2d 438	1962	Yes		Yes		
" "	Jones v. Central of Georgia Ry. Co.	220 F. Supp. 909	1963	331 F. 2d 649	1964	Yes			Yes	
" "	Alabama State Federation of Labor v. Kurn, et al.	46 F. Supp. 385	1942						Yes	Dismissed for reas trustee of bankru award which was a
Sixth Circuit	Brotherhood of Maintenance of Way Employees v. Nashville, C. & St. L. Ry. Co.	56 F. Supp. 559	1944			Yes			Yes	
" "	Odom v. Thompson	85 F. Supp. 477	1949			Yes		Yes		
" "	Thomas v. New York C. & St. L. R. Co.	Not Reported		185 F. 2d 614	1950	Yes			Yes	
" "	Brotherhood of Railway & S. Clerks v. Railway Express Agency	137 F. Supp. 653	1955	238 F. 2d 181	1956	Yes			Yes	
" "	Russ v. Southern Ry. Co.	218 F. Supp. 634	1963	334 F. 2d 224	1964	Yes			Yes	
Seventh Circuit	Order of Sleeping Car Conductors v. Pullman Co.	47 F. Supp. 599	1942							The District Court the award.
" "	Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co.	70 F. Supp. 914	1947	166 F. 2d 326	1948				Yes	Court held the awa and indefinite to f ment suit.
" "	Knudsen v. Chicago & Northwestern Ry. Co.	106 F. Supp. 48	1952						Yes	Court held the awa definite and certain in favor of the pla
" "	Brotherhood of Sleeping Car Porters v. Pullman Co.	Not Reported		200 F. 2d 160	1952	Yes			Yes	The District Court Court of Appeals trict Court and ord
Eighth Circuit	Cook v. Des Moines Union Ry. Co.	16 F. Supp. 810	1936			Yes		Yes		
" "	Order of Railroad Telegraphers v. New Orleans, T. & M. Ry. Co.	135 F. Supp. 825	1954	229 F. 2d 59	1956				Yes	Court held award rendered without Certiorari denied S. Ct. 548.
" "	Boos v. Railway Express Agency	153 F. Supp. 14	1957	253 F. 2d 896	1958	Yes			Yes	
Ninth Circuit	Southern Pac. Co. v. Joint Council Dining Car Employees	Not Reported		165 F. 2d 26	1947	Yes			Yes	The District Court enforced. The C ment. Certiorari 1122, 68 S. Ct. 60
" "	Gunther v. San Diego & A. E. Ry. Co.	161 F. Supp. 295	1958			Yes			Yes	
" "	Callan v. Great Northern Ry. Co.	Not Reported		299 F. 2d 908	1961	Yes			Yes	

SUITS IN THE UNITED STATES COURTS TO ENFORCE NATIONAL RAILROAD ADJUSTMENT BOARD AWARDS (Continued).

Style	District Court	Date	Court of Appeals	Date	N.R.A.B. Award Reviewed by Court and Enforced or Denied on Merits	N.R.A.B. Award Not Reviewed by Court Because of Being Final and Binding	Enforcement Ordered	Enforcement Denied	Comment
ith v. Louisville & N. R. Co.	112 F. Supp. 388	1953			Yes			Yes	
dges v. Atlantic Coast Line ilroad Company			310 F. 2d 438	1962	Yes		Yes		
es v. Central of Georgia Co.	220 F. Supp. 909	1963	331 F. 2d 649	1964	Yes			Yes	
abama State Federation of bor v. Kurn, et al.	46 F. Supp. 385	1942						Yes	Dismissed for reason that suit was brought against trustee of bankrupt railroad for enforcement of award which was against the railroad corporation.
otherhood of Maintenance Way Employees v. Nashe, C. & St. L. Ry. Co.	56 F. Supp. 559	1944			Yes			Yes	
om v. Thompson	85 F. Supp. 477	1949			Yes		Yes		
omas v. New York C. & St. R. Co.	Not Reported		185 F. 2d 614	1950	Yes			Yes	
otherhood of Railway & Clerks v. Railway Express ency	137 F. Supp. 653	1955	238 F. 2d 181	1956	Yes			Yes	
s v. Southern Ry. Co.	218 F. Supp. 634	1963	334 F. 2d 224	1964	Yes			Yes	
der of Sleeping Car Conctors v. Pullman Co.	47 F. Supp. 599	1942							The District Court ordered a trial on the merits of the award.
ilroad Yardmasters of rth America v. Indiana rbor Belt R. Co.	70 F. Supp. 914	1947	166 F. 2d 326	1948				Yes	Court held the award and order were too uncertain and indefinite to furnish the basis for an enforcement suit.
udsen v. Chicago & Northstern Ry. Co.	106 F. Supp. 48	1952						Yes	Court held the award and order were not sufficiently definite and certain so as to make a prima facie case in favor of the plaintiff.
otherhood of Sleeping Car ters v. Pullman Co.	Not Reported		200 F. 2d 160	1952	Yes			Yes	The District Court ordered the award enforced. The Court of Appeals reversed the decision of the District Court and ordered enforcement to be denied.
k v. Des Moines Union Co.	16 F. Supp. 810	1936			Yes		Yes		
der of Railroad Telegrars v. New Orleans, T. & Ry. Co.	135 F. Supp. 825	1954	229 F. 2d 59	1956				Yes	Court held award void for reason that it had been rendered without notice to indispensible parties. Certiorari denied 350 U. S. 997, 100 L. Ed. 861, 76 S. Ct. 548.
s v. Railway Express ency	153 F. Supp. 14	1957	253 F. 2d 896	1958	Yes			Yes	
thern Pac. Co. v. Joint ncil Dining Car Emyees	Not Reported		165 F. 2d 26	1947	Yes			Yes	The District Court had ordered the N.R.A.B. award enforced. The Court of Appeals denied enforcement. Certiorari denied 333 U. S. 838, 92 L. Ed. 1122, 68 S. Ct. 608.
ther v. San Diego & E. Ry. Co.	161 F. Supp. 295	1958			Yes			Yes	
lan v. Great Northern Co.	Not Reported		299 F. 2d 908	1961	Yes			Yes	

CERTIFICATE OF SERVICE.

I, H. G. Breetz, one of the attorneys for Respondent, Louisville and Nashville Railroad Company, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10th day of October, 1964, I served copies of the foregoing brief and appendix on the Petitioners by mailing copies, in duly addressed envelopes with first-class postage prepaid, to Mr. Al G. Rives, Mr. Clarence M. Small, Jr., and Rives, Peterson, Pettus & Conway, Seventeenth Floor, Twenty-One Twenty-One Building, Birmingham 3, Alabama, Attorneys for Petitioners.

H. G. BREETZ

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 494

BROTHERHOOD OF RAILROAD TRAINMEN AND
A. W. DAVIS,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Transcontinental & Western Air v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953) 4

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PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Come now the Petitioners, Brotherhood of Railroad Trainmen and A. W. Davis under and by authority of Rule 58 (2) of the Rules of the Supreme Court of the United States and petition this court for rehearing of the order entered on December 7, 1964 denying a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above styled case on the ground that circumstances have intervened which are of substantial and controlling effect.

STATEMENT OF GROUND IN SUPPORT OF PETITION

The United States Court of Appeals for the Fifth Circuit, determining that the decision of this court in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, 373 U.S. 33, 83 S. Ct. 1059, 10 L. Ed. 2d 172 (1963), was not controlling, held, in the instant case, that non-money awards of the National Railroad Adjustment Board were reviewable on the merits by trial de novo despite Section 3, First (m) of the Railway Labor Act providing that such awards are "final and binding" on both parties to the dispute. 45 U.S.C.A., § 153 (m). On petition for writ of certiorari petitioners took the position that this decision of the United States Court of Appeals for the Fifth Circuit involved an important question under the Railway Labor Act which had not, but should be, settled by this Court and that said decision conflicted with the principles of applicable decisions of this Court, particularly, *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, *supra*.

After the printing for immediate filing of the petition for certiorari, the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Russ* v. *Southern Railway Company* was published in the Federal Reporter Advance Sheets. *Russ* v. *Southern Railway Company*, 334 F.2d 224 (C.A. 6th 1964). Contrary to the Court of Appeals for the Fifth Circuit in the instant case, the Court of Appeals for the Sixth Circuit in the *Russ Case* interpreted the decision of this court in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company*, *supra*, as holding that non-money awards of the National Railroad Adjustment Board are final and binding on both

parties to the dispute and that only money awards are reviewable on their merits. The result is that a substantial conflict in the interpretation of this court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra,* has intervened and now exists between the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Sixth Circuit, *Brotherhood of Railroad Trainmen* v. *Louisville and Nashville Railroad Company*, 334 F.2d 79 (C.A. 5th 1964); *Russ* v. *Southern Railway Company*, 334 F.2d 224 (C.A. 6th 1964).

As borne out by the *Russ Case, supra,* the logical interpretation of this court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra,* is that non-money awards of the National Railroad Adjustment Board are "final and binding" under Section 3, First (m) of the Railway Labor Act and, therefore, not subject to review on the merits by trial de novo. Such an interpretation is further justified in light of *Union Pacific Railroad Company* v. *Price*, 360 U.S. 601, 79 S. Ct. 1351, 3 L. Ed. 2d 1460 (1959), where this Court refused to allow an employee who had received an adverse determination of his claim before the Board to relitigate the merits of his discharge in the courts. The reason for such a result was that the denial of the claim by the Board constituted a non-money award made final and binding by Section 3, First (m), 45 U.S.C.A., § 153 (m). This court recognized in that decision that when the Railway Labor Act was enacted the "employees were willing to give up their remedies outside of the statute provided a *workable and binding statutory scheme was established to settle grievances*" [emphasis added] p. 613.

The result of the decision of the Fifth Circuit in the instant case and the refusal of this court to review the

same is that the employee, except where state law does not require exhaustion of administrative remedies, must submit his grievance to the National Railroad Adjustment Board. *Pennsylvania Railroad Company* v. *Day*, 360 U.S. 548, 79 S. Ct. 1322, 3 L. ed. 2d 1422 (1959); *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. ed. 1325 (1953). After long delay, in this case more than two years,[1] the board will decide the dispute. If the decision is adverse, the employee is prevented by the final and binding provisions of Section 3 First (m) from further review of a non-money award. Now the Fifth Circuit has held that even if a non-money award is rendered favorable to the employee he must relitigate the matter in its entirety in the courts despite the provision of Section 3 First (m) that such an award is final and binding on "*both*" parties to the dispute. Thus the "workable and binding statutory scheme" for which the employee has traded his remedy outside the Railway Labor Act is nothing more than a device by which the carrier may delay as much as four years[2] the ultimate decision on his grievance. An adverse determination by Board means economic death for the employee and now even an order of reinstatement is but an empty gesture creating a hope which may later be frustrated by courts and juries unfamiliar with the intricacies of labor disputes within the Railway industry. Congress did not intend that the employee receive so harsh a bargain nor such discriminatory treatment when he relinquished his outside remedies and so provided in Section

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1. Petitioner Davis was discharged on January 9, 1959, and was ordered reinstated by the National Railroad Adjustment Board on February 17, 1961. The merits of the award of reinstatement were retried in the Federal District Court and judgment was entered on March 29, 1963.

2. See footnote 1.

3, First (m) that "awards shall be final and binding on both parties to the dispute, except insofar as they shall contain a money award." 45 U.S.C.A., § 153 (m).

This court now has the opportunity to decide a question not heretofore determined which is vital to the effectiveness of the National Railroad Adjustment Board in the disposition of grievances within the railroad industry. From the decision of the Fifth Circuit in the instant case and the decision of the Sixth Circuit in the *Russ Case*, it is apparent that confusion and conflict exists among the circuits as to how this Court's decision in *Brotherhood of Locomotive Engineers* v. *Louisville and Nashville Railroad Company, supra*, applies to the question presented. It is respectfully submitted that the court should dissolve this conflict by granting the Petition for Writ of Certiorari in the instant case.

Respectfully submitted,

.....,

AL G. RIVES,
Attorney for Petitioners.

CLARENCE M. SMALL, JR., AND
RIVES, PETERSON, PETTUS & CONWAY,
Of Counsel for Petitioners.

CERTIFICATE UNDER RULE 58 (2)

I, Al G. Rives, attorney of record for the Petitioners, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay and that the same is restricted to the ground that circumstances have intervened which are of substantial and controlling effect.

.....

AL G. RIVES,
Attorney for Petitioners.

CERTIFICATE AS TO SERVICE

I hereby certify that I have mailed a copy of the foregoing Petition for Writ of Certiorari properly addressed, to each of the following: Honorable James A. Simpson and Honorable Henry E. Simpson, Exchange Security Building, Birmingham, Alabama; and Honorable H. G. Breetz and Honorable M. D. Jones, L & N Office Building, 908 West Broadway, Louisville 1, Kentucky, all counsel of record for the respondent, by depositing the same in a United States Post Office or mail box, with first class postage prepaid.

This the ..... day of December, 1964.

.....

AL G. RIVES,
Attorney for Petitioners.